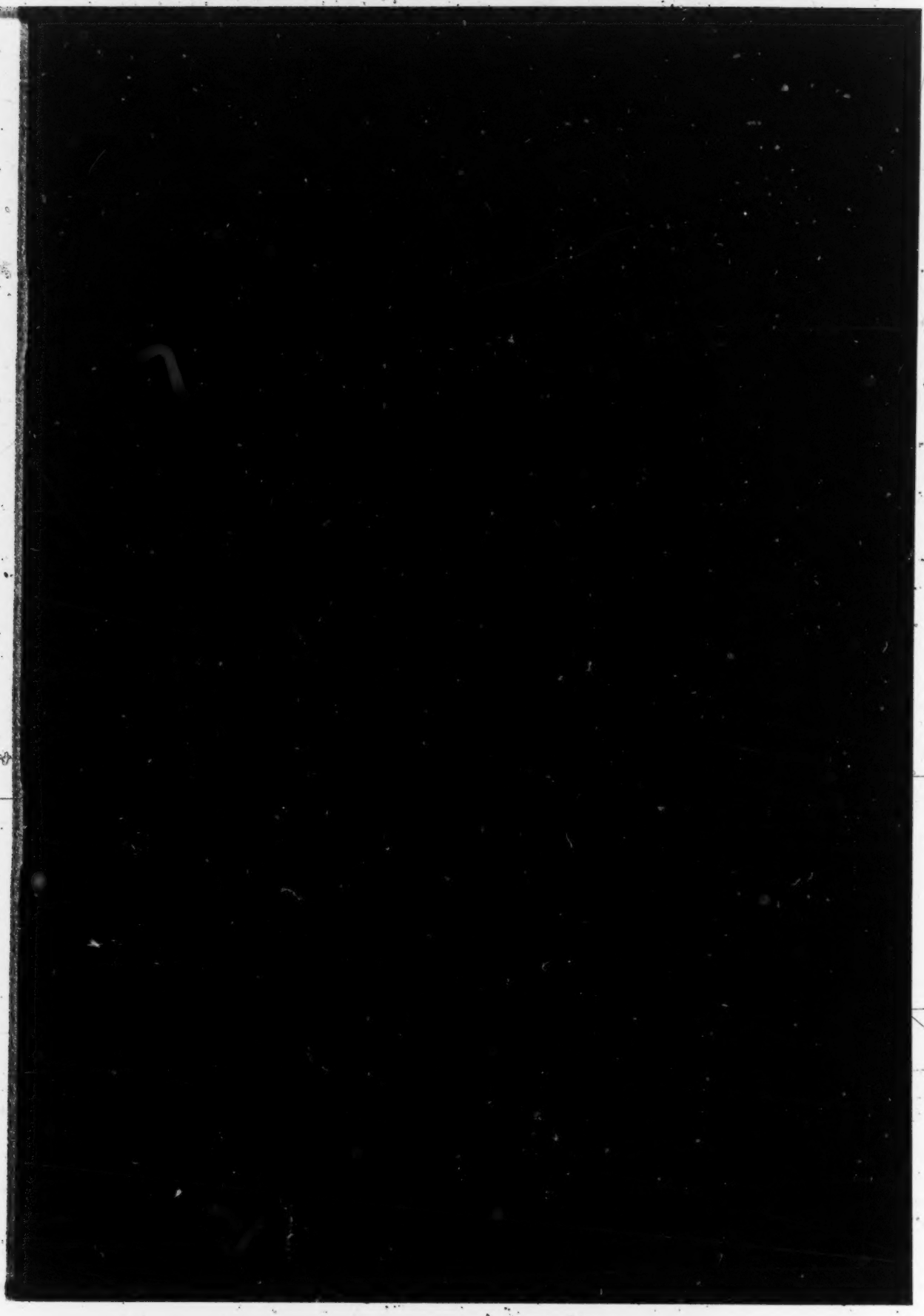

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	II
PETITION FOR WRIT	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS & STATUTES	3
STATEMENT OF CASE	3
FEDERAL QUESTION	4
REASONS FOR GRANTING WRIT	5
ARGUMENT	6
CONCLUSION	8
CERTIFICATE	9
APPENDIX "A"	10
APPENDIX "B"	12
APPENDIX "C"	20
APPENDIX "D"	21

INDEX OF AUTHORITIES

Cases:

Billiot v. Sewart Seacraft, Inc. ..... 7, Appendix D

Loffland Bros. Co. v. Huckabee, 373 F.2d 528 (CCA 5, 1967) 6

Pure Oil Co. v. Snipes, 293 F.2d 60 (CCA 5, 1961) .....

Romero v. Frank's Casing Crew, etc., 229 F. Supp. 41 (D.C., La., 1964), 342 F.2d 999 (CCA 5, 1964) 5, 6

Constitutional Provisions:

Federal:

Article III, Section 2 3

Statutes:

Federal:

28 U.S.C.A. 1257 (3) 2

28 U.S.C.A. 1333 (1) 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No.

NEWELL H. SMITH, JR.,
Petitioner,

versus

NOBLE DRILLING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Newell H. Smith, Jr., a merchant seaman, prays that a writ of certiorari issue herein to review the judgment and decree of the Louisiana Supreme Court rendered against petitioner on June 30, 1967. (Appendix "C")

OPINIONS BELOW

The opinion of the court of first instance, the Civil District Court for the Parish of Orleans, Louisiana,

dismissing petitioner's suit, is unreported; it is printed in full as Appendix "A" hereof.

The opinion of the Louisiana Court of Appeal, Fourth Circuit, affirming the dismissal, is reported in 199 So. 2d 36 (1967) and is re-printed as Appendix "B" hereof.

The opinion and decree of the Louisiana Supreme Court, refusing a writ, is reported in 200 So. 2d 666 (1967) and is re-printed as Appendix "C" hereof.

JURISDICTION

On June 30, 1967, the Supreme Court of Louisiana refused a writ of certiorari to the Louisiana Court of Appeal, Fourth Circuit to review its judgment and opinion adverse to petitioner on May 1, 1967 (rehearing denied June 5, 1967).

The decisions and decrees of these state courts involved interpretation and application of general maritime law principles to the alleged personal injury claims of petitioner as a merchant seaman.

Therefore, the jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C.A. 1257 (3); June 25, 1948; c. 646, 62 Stat. 929.

QUESTIONS PRESENTED

There is only one question presented by this petition, to-wit:

Under the general maritime law of the United States, if a seaman is injured by the alleged joint conduct of his employer and a third party, may he settle with his employer and effectively reserve and retain his rights against the third party?

CONSTITUTIONAL PROVISIONS AND STATUTES

There are no statutes or constitutional provisions, *per se*, involved in this matter.

The principles of law construed and applied emanate from the body of non-statutory general maritime law of the United States to which the federal judicial power is extended by Article III, §2 of the United States Constitution.

The state courts below acquired jurisdiction of the instant subject matter by virtue of the so-called "saving-to-suitors" clause of 28 U.S.C.A. 1333 (1).

STATEMENT OF THE CASE

Petitioner, Newell Smith, Jr., was employed by Service Contracting, Inc., as a member of the crew of a petroleum production tender-vessel in the Gulf of Mexico. He was injured and began suit in the Civil District Court for the Parish of Orleans, Louisiana, against his immediate employer, Service Contracting, the vessel owner, California Company, and another

California Company contractor, Noble Drilling Corporation, respondent herein.

Petitioner concluded that he had no tenable claim against California Company and voluntarily dismissed that defendant. Then, prior to trial, petitioner compromised his claims against his employer, Service Contracting, but specifically reserved his rights against Noble Drilling Corporation, respondent herein.

Noble moved for summary judgment on the ground that the compromise with Service Contracting, notwithstanding the reservation of rights, also released Noble as a matter of law. This motion was granted and petitioner's suit against the remaining defendant below was dismissed. (Appendix "A").

Petitioner appealed to the Louisiana Court of Appeal, Fourth Circuit and that court affirmed the dismissal. (Appendix "B").

Petitioner then applied to the Louisiana Supreme Court for certiorari and that court refused the writ on June 30, 1967. (Appendix "C").

Hence this Petition has been filed.

THE FEDERAL QUESTION

The injury involved in this litigation occurred in the Gulf of Mexico on the Outer Continental Shelf of the United States.

In *Pure Oil Company v. Snipes*, 293 F. 2d 60 (1961) the United States Court of Appeals, Fifth Circuit, held that federal maritime law, not state law, exclusively applies to such injuries.

In deciding the instant case, the State courts below sought to determine and apply federal maritime law principles. Indeed, they held specifically that federal law controlled the rights of the parties and dismissed petitioner's case solely upon the authority of *Romero v. Frank's Casing Crew, etc.*, 229 F. Supp. 41 (D.C., La., 1964) Aff'd, per curiam, 342 F. 2d 998 (CCA 5, 1964).

Therefore, the federal question in this case arises out of the subject matter of the litigation itself. Again, it is:

> Under federal maritime law, does the restricted release of one joint tortfeasor *ipso facto* release all others?

REASONS FOR GRANTING THE PETITION

The state courts below have incorrectly decided a substantial and an important question of federal maritime law, not heretofore passed upon by this Honorable Court; moreover, in so doing, the state courts have followed and applied a federal court decision which has been subsequently ignored and expressly criticized by the court which authored it.

ARGUMENT

As has been stated, the trial court and the Louisiana Court of Appeal, Fourth Circuit, both relied solely and only upon the authority of *Romero v. Frank's Casing Crew, supra,* to support their dismissal of petitioner's claim against the respondent herein.

Romero did involve the factual situation extant here, that is, the release by a seaman of his Jones Act employer and the attempted reservation of rights by the seaman against an alleged third-party joint tortfeasor. However, two additional factors existed in *Romero:* (1) the lower court in *Romero* found, presumably as a fact, that the seaman had recovered all the damages to which he was entitled *via* the settlement with his employer; and (2) the reservation of rights was actually held to be a *contra bones mores* device intended to enforce subrogation of the employer to the seaman's rights against the alleged third-party tortfeasor. Neither of these two factors is present in the instant case.

Significantly, we submit, neither of the above-mentioned factors existed in *Loffland Bros. Co. v. Huckabee,* 373 F. 2d 528 (CCA 5, 1967) wherein a seaman employed by Marine Catering Service settled with that employer and reserved his rights against Loffland Bros., a third-party whose position is absolutely indistinguishable from respondent's position in the instant case.

However, without even a mention of *Romero, supra,* the Court of Appeals, Fifth Circuit, in *Loffland* ap-

proved and permitted the identical course of action which petitioner, Newell Smith, Jr., sought to pursue in the instant case.

Similarly, little more than one month ago, the same Court of Appeals affirmatively decided the collateral question: May a seaman settle with an alleged third-party tortfeasor and reserve his rights against his employer? *Billiot v. Sewart Seacraft, Inc.* (No. 23,888, decided August 18, 1967, and printed in Appendix "D" hereof).

In *Billiot* the employer specifically relied on *Romero* and the Court of Appeals, Fifth Circuit, in rejecting the *Romero* result, said:

> *"We decline to follow that case, which is inconsistent with Loffland, because* the district court in *Romero relied on decisions which are inapposite to the question presented here,* namely, whether a plaintiff may sue his alleged employer-tortfeasor for damages after settling with an alleged third-party tortfeasor." (Emphasis added)

We submit that the distinction between *Romero* and *Billiot* is a factual distinction without a legal difference. The seaman in *Billiot* was permitted to settle with the third-party and still sue his allegedly jointly-liable employer. There is no sound reason why Newell Smith, Jr. should not be allowed to settle with his employer and proceed, at least for any deficiency, against the allegedly jointly-liable third-party, Noble Drilling Corporation. *Loffland Bros. Co. v. Huckabee, supra.*

Romero, Loffland and *Billiot* deal incongruously with an important admiralty law principle — the effect of a restrictive release in maritime personal injury cases; this Honorable Court should settle and resolve this issue for the benefit of all future litigants and their legal advisors.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted, to the end that this Honorable Court will review the decisions below, hold that petitioner is entitled to his day in court against respondent and remand this cause to the Supreme Court of Louisiana with directions to review and reverse the judgment and decree of the Louisiana Court of Appeal, Fourth Circuit which erroneously affirmed the dismissal of petitioner's action.

All of which is

Respectfully submitted,

SAMUEL C. GAINSBURGH
ROBERT G. HEBERT

By: _____

SAMUEL C. GAINSBURGH
1718 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
ATTORNEYS FOR
PETITIONER

Of Counsel:
KIERR and GAINSBURGH
New Orleans, Louisiana

CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Petition for Certiorari have been served upon respondent, Noble Drilling Corporation, by depositing the same, postage prepaid, in the United States mail, addressed to George V. Baus, Esq., c/o Adams and Reese, Attorneys at Law, 847 National Bank of Commerce Building, New Orleans, Louisiana, 70112, at New Orleans, Louisiana, this ____ day of September, 1967.

Samuel C. Gainsburgh
1718 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112

APPENDIX "A"

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION "C"

No. 424-272 DOCKET #4

NEWELL H. SMITH, JR.
VERSUS
SERVICE CONTRACTING, INC.,
NOBLE DRILLING CO., et al

REASONS FOR JUDGMENT

After considering the pleadings and argument of counsel, the Court concludes that the motion to strike the third party petition herein is governed by the decision of *Halcyon v. Haenn Ship Ceiling and Refining Corp.*, 342 U.S. 282, 96 L. Ed. 318 (1952), holding that there is no right of contribution nor indemnity in cases of this nature; accordingly, the motion will be granted. The Court further concludes that the motion for summary judgment dismissing the plaintiff's petition is controlled by the decision of Romero v. Frank's Casing Crew and Rental Tools, Inc., 229 F. Supp. 41, (D.C., La. 1964), affirmed 342 F.2d 999, (C.A. 5, 1964), holding that a monetary settlement coupled with a dismissal of claim against one alleged tortfeasor, in a case of this nature, will bar prosecution of all claims against any other alleged tortfeasor, regardless of whether or not the amount received in said settlement actually constitutes

full compensation for plaintiff's damages; this Court is not in agreement with that decision, as the legal issue raised therein appears to be that of credit against judgment rather than election of remedies, but this Court considers the decision a ruling case in the maritime field, accordingly the motion will be granted. Judgment will be entered accordingly.

/s/ FRED J. CASSIBRY
JUDGE

New Orleans, Louisiana
July 7, 1966.

APPENDIX "B"

No. 2,571

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NEWELL H. SMITH, JR.
VERSUS
SERVICE CONTRACTING, INC.,
THE CALIFORNIA COMPANY,
NOBLE CASUALTY COMPANY
AETNA CASUALTY & SURETY CO.,
and LIBERTY MUTUAL INS. CO.

APPEAL FROM THE CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS, No. 424,272,
DIVISION "C",
HONORABLE FRED J. CASSIBRY, JUDGE.

L. JULIAN SAMUEL
JUDGE

May 1, 1967

(Court composed of Judges L. Julian Samuel,
Paul E. Chasez and Chris T. Barnette)

WILLIAM P. RUTLEDGE, for plaintiff-appellant.

ADAMS AND REESE,
GEORGE V. BAUS, for defendants-appellees, and third party plaintiff-appellant.

AFFIRMED.

INITIALS:
L.J.S.
P.E.C.
C.T.B.

This litigation was commenced when Newell H. Smith, Jr., the present plaintiff, filed a libel in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against Service Contracting, Inc., The California Company and (by amendment) Noble Drlling Company. The libel was brought pursuant to the provisions of the Jones Act and the general maritime law of the United States. It sought damages for injuries allegedly sustained by the libelant on December 11, 1962, on a stationary oil drilling platform located in the Gulf of Mexico off the coast of Louisiana and also sought maintenance and cure in a separate cause of action against Service.

Smith had accepted and received payments from Service's insurer for the same accident alleged in the libel and a compensation award had been made by the Deputy Commissioner under the Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333 (c), which incorporates the remedies of the Longshoremen's and Harbor Workers' Compensation Act for employees injured while conducting operations on the Outer Conti-

nental Shelf of the Gulf of Mexico. Basing its motion on the acceptance of those benefits and that award, and the fact that Smith had allowed the award to become final without appealing therefrom, Service moved for summary judgment against the libel on the grounds of res judicata and collateral estoppel. After a hearing on the motion the Federal District Court held that the making and acceptance of the compensation award did not bar Smith from asserting his claim against Service. That reported decision is *Smith v Service Contracting, Inc.*, 236 F. Supp. 492.

In an attempt to obtain a quicker disposition of his claims, Smith filed the instant suit in the Civil District Court for the Parish of Orleans for the same injuries, damages and maintenance and cure as were involved in the libel. Named defendants herein are the same parties who had been made respondents in the libel and Aetna Casualty & Surety Company and Liberty Mutual Insurance Company, respective insurers of Noble and Service. Plaintiff then dismissed his federal court action as of non-suit and without prejudice. Subsequently he voluntarily dismissed California from this suit and the only remaining defendants were Noble, Service, Aetna and Liberty.

During May of 1965, after California had been dismissed from the suit, plaintiff entered into a compromise with Service and Liberty by which, in consideration of the sum of $20,500 additional to the approximate amount of $3,500 previously paid to him by Liberty, he released and discharged Service, Liberty and California from any and all liability arising out of the

accident upon which this suit is based. In the compromise plaintiff specifically reserved all of his rights against Noble and Aetna.

After that compromise had been effected Noble and Aetna sought to remove the case to the federal court on the basis of diversity of citizenship. However, the case was remanded to the state court by the federal court on the ground that it was a Jones Act suit which is not removable.

Following the remand to the Civil District Court Noble filed a third-party complaint against Service and Liberty seeking judgment over and against those third-party defendants in the event of judgment in favor of the original plaintiff and against Noble. Other pleadings were filed in connection with the third-party petition. But in view of the conclusion we have reached we find it unnecessary to discuss that petition or those other pleadings.

Pertinent here is the filing by Noble and Aetna of a motion for summary judgment against the plaintiff. The motion is based primarily on the contention that having recovered once for his injuries in the compromise and release of his claims against Service, Liberty and California, plaintiff cannot recover again from Noble and Aetna for the same injuries despite the reservation of his rights against Noble and Aetna.

After a hearing on the rule to show cause why the same should not be granted, the trial court rendered a summary judgment dismissing plaintiff's suit against

Noble and Aetna. Plaintiff has prosecuted this appeal therefrom. In this court Noble and Aetna contend for the first time (no objection was made thereto in the trial court) that the state courts have no jurisdiction over the subject matter of this suit for the reason that the Outer Continental Shelf Lands Act vests such jurisdiction exclusively in the federal courts, citing *Gravois v Travelers Indemnity Company,* 173 So.2d 550.

Addressing ourselves first to the jurisdictional question, we note that the failure of Noble and Aetna to object to the jurisdiction prior to appeal is immaterial. Under LSA-C.C.P. Art. 3 jurisdiction of a court over the subject matter of an action, unlike jurisdiction over the person (LSA-C.C.P. Arts. 6 and 7), cannot be conferred by consent of the parties. However, we are of the opinion that the Courts of the State of Louisiana do have jurisdiction over the subject matter in the instant case.

Plaintiff's petition alleges he was employed by the defendants (Service, California and Noble) as a member of the crew of the motor vessel S-24 which was being jointly operated by the defendants as a tender in oil drilling operations in the Gulf of Mexico; in compliance with orders he went upon the drilling platform which the vessel was tending for the purpose of unloading equipment from the vessel to the platform; and he sustained the injuries for which he filed this suit while on the platform during that unloading operation. From the record before us we are satisfied plaintiff was a seaman, a member of a crew of a vessel, and covered by the Jones Act, 46 U.S.C.A. §688, at the time

he sustained the injuries for which he sues. The case has not been tried on the merits and the record does not establish, as Noble and Aetna contend, that plaintiff was employed only by Service and not by the other defendants.

In view of the fact that on two occasions during the course of this litigation the federal court has found plaintiff was a seaman covered by the Jones Act, we consider unnecessary a further discussion of that question. The two occasions on which the Federal District Court so found involved the motion for summary judgment by Service (*Smith v Service Contracting, Inc., supra*) and the remand of this case to the Civil District Court as a result of the attempt by Noble and Aetna to remove the same to the federal court on the basis of diversity of citizenship.

The Outer Continental Shelf Lands Act, 43 U.S.C.A. §1333 (c)(1), specifically excludes members of a crew of a vessel from coverage. *Gravois*, the case relied on by appellees, is not apposite here. For as the majority opinion carefully points out, the Jones Act was not there applicable. The person for whose death recovery was sought in that suit was not a seaman; he was a member of an installation crew working on a fixed structure in the Gulf of Mexico belonging to his employer, Freeport Sulphur Company. Here the Jones Act, which affords recovery for injury to seamen, and the "saving to suitors" clause of 28 U.S.C.A. §1333 (1), which provides for exclusive jurisdiction in the District Courts of the United States in civil cases of admiralty or maritime jurisdiction ". . . saving to suit-

ors in all cases all other remedies to which they are otherwise entitled", are applicable. And, the plaintiff having elected to pursue his remedy in the Court of the State of Louisiana, those courts do have jurisdiction. Engle v Davenport, 46 S.Ct. 410, 271 U.S. 33; Panama R. Co. v Vasquez, S.Ct. 596, 271 U.S. 557; Red Cross Line v Atlantic Fruit Co., 44 S.Ct. 274, 264 U.S. 109; Sidney v Lykes Bros. S.S. Co., 8 So.2d 550; 2 C.J.S. Admiralty §7, 8; 32 Tul. L. Rev. p. 175.

The trial court based its rendition of the summary judgment appealed from on *Romero v Frank's Casing Crew & Rental Tools, Inc.*, 229 F.Supp. 41 (1964), *aff'd*, 342 F.2d 999 (1964). In *Romero* plaintiff brought suit under the Jones Act and the general maritime law against his former employer and its insurance carriers for injuries allegedly sustained while working on a drilling barge in the Gulf of Mexico, joining with those demands a claim for maintenance and cure. Previously he had filed a suit for the same accident against Union Oil Company of California and its drilling contractor, the Offshore Company, for full indemnity by way of damages for all losses resulting from the same injuries. He dismissed that prior suit after compromising his claims against Union and Offshore. In the compromise plaintiff released his claims against Union, Offshore, a second oil company, and their insurers and subrogated the released parties to his claims against Frank's, the defendant in the cited case, and its insurers up to the amount received by him in the compromise with the understanding that he might proceed against Frank's and its insurers as to his claims against them. First assuming that plaintiff was a sea-

man, the federal courts held that, his rights being cumulative, he could recover only once for the one injury and accordingly rendered judgment dismissing his suit against his former employer and its insurers.

Appellant concedes there is no issue as to material fact involved in the motion for summary judgment now before us and that the only question presented by his appeal is whether movers, Noble and Aetna, are entitled to such a judgment as a matter of law. He also concedes the rule of *Romero* is the prevailing federal jurisprudence on the subject and that, on the material facts here involved, the instant case cannot be distinguished from *Romero*.

Under these circumstances we must affirm the judgment appealed from. For where, under the "saving to suitors" clause, a Jones Act suit is brought in a state court, the substantive law to be applied is that which would have been applicable had the action been brought in an admiralty court; the state court is bound by the jurisprudence of the federal courts under the Jones Act. Macomber v DeBardeleben Coal Co., 200 La. 633, 8 So.2d 624; Ursich v daRosa, 328 F.2d 794; 2 Am.Jur. 2d, Admiralty §105, 106.

The judgment appealed from is affirmed.

AFFIRMED.

APPENDIX "C"

SUPREME COURT OF LOUISIANA
New Orleans, 70112

Newell H. Smith, Jr. June 30, 1967
v.
Service Contracting, Inc., et al No. 48,795

In re: Newell H. Smith, Jr., applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans

---

Writ refused.

There is no error of law in the judgment of the Court of Appeal.

/s/ JWS
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ WBH
/s/ FWS

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, June 30, 1967
/s/ HAROLD A. MAISE, JR.
Deputy Clerk

APPENDIX "D"

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 23888

MRS. CHESTER BILLIOT, Individually and as Administratrix of the Estate of her Minor Daughter, Kathy Ann,

Appellant,

versus

SEWART SEACRAFT, INC.

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(August 18, 1967.)

Before HUTCHESON and GODBOLD, Circuit Judges, and NEOL, District Judge.

HUTCHESON, Circuit Judge: This appeal is from a dismissal by summary judgment of the libel instituted by appellant to recover damages for the death of her husband. We reverse the summary judgment and remand.

Appellant, the administratrix of the estate of her husband, Chester Billiot, originally filed this action in the court below against Sewart Seacraft, Inc. and J. Ray McDermott & Co., Inc. to recover damages for Billiot's death. She claimed a right to recover for herself and for her minor daughter. The complaint alleged that the injury occurred while decedent, a seaman working on a towboat owned by Seacraft, was engaged in refueling the towboat from a barge belonging to McDermott. It was claimed that the decedent "slipped and fell or was thrown" from either the barge or the towboat when a ship, also owned by McDermott and tied to the barge, suddenly moved away from it, causing a slack line to become taut and strike the decedent. He was taken to a hospital where he died a week later. The complaint stated that the injury happened within the Louisiana state maritime boundaries. The asserted liability of Seacraft and McDermott was predicated upon the negligence of both and the unseaworthiness of their vessels, the towboat and barge respectively. The complaint in addition sought damages for Billiot's pain and suffering before he died.

Before the suit came on for trial, the appellant filed another complaint in a Louisiana state court. That complaint is not in the record, but it apparently was similar to the one filed in the court below except that it named several other defendants in addition to Seacraft and McDermott. In advance of trial in the state court, the appellant settled all her claims against McDermott and some of the other defendants, not includ-

ing Seacraft, for $21,075. The general release received by McDermott expressly reserved all rights against Seacraft. Thereupon the appellant dropped McDermott from the action filed in the court below.

When the appellant returned to the court below to assert the reserved claims against Seacraft, the district court granted Seacraft's motion for summary judgment, relying solely on the appellant's settlement with McDermott. Apparently the court was of the opinion that the settlement operated as a matter of law to fully satisfy the appellant for all claims arising out of Billiot's death and that any further amounts recovered from Seacraft therefore would give her an impermissible double recovery of damages. We agree that the appellant should not be allowed to obtain a double recovery, but under the facts of this case, we feel that, in restricting the appellant's recovery as a matter of law to a settlement with one of the two alleged tortfeasors, the district court may have denied appellant her right to receive adequate compensation.

The release effectively reserved appellant's rights against Seacraft. We see no reason why appellant should not be permitted to sue Seacraft and obtain a verdict for the total damages caused by Seacraft, if any. A double recovery may be prevented by deducting the amount of the settlement payment from

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[1]Contrary to the old common-law rule, today a release intending to save the releasor's rights does not automatically surrender those rights. Aro Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc., 377 U.S. 476, 501 (1964). See also Petroleum Carrier Corp. v. Carter, 233 F.2d 402, 404 (5th Cir. 1956).

the total damages. Judgment then may be awarded to appellant for the balance. The procedure should fully compensate the appellant while not providing her with unjust enrichment.

This procedure has been used successfully in suits based on negligence in other areas of the law, see, e.g., *State Farm Mut Auto. Ins. Co. v. Bourne*, 220 F.2d 921 (5th Cir. 1955); *Cudd v. Great Amer. Ins. Co.*, 202 F. Supp. 237 (W.D.La. 1962),[2] and we recently approved its use in a maritime tort case quite similar to the one before us. *Loffland Bros. v. Huckabee*, 373 F.2d 528 (No. 22960, March 2, 1967).

In *Loffland*, three suits brought by an injured seaman were consolidated. In two separate complaints, the plaintiff had sued his employer under different causes of action, for negligence under the Jones Act, 46 U.S.C. Sec. 688, and for maintenance and cure. The third suit, against Loffland, alleged negligence and unseaworthiness under the general maritime law. In advance of trial, the plaintiff settled all the claims against his employer for $11,000. Rather than holding that this settlement was all that the plaintiff was entitled to receive for his injuries, the court allowed the claim for damages against Loffland to proceed to trial. The jury found that Loffland was liable to the plaintiff for $42,500. In order to prevent an unjust double recovery of damages, the judge credited

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[2]See also Sylvania Elec. Prods., Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955), cert. denied, 350 U.S. 988 (1956); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943).

this verdict with the $11,000 payment plaintiff had received from his employer. Judgment was given for the balance of $31,500. On appeal by Loffland, the plaintiff filed a cross-appeal challenging the procedure by which the court reduced the verdict by the amount of the settlement. We affirmed the judgment of the district court, thereby approving the method which we now hold should have been used in the case at bar.

In granting summary judgment, the court below relied on *Romero v. Frank's Casing Crew & Rental Tools, Inc.*, 229 F. Supp. 41, aff'd per curiam, 342 F. 2d 999 (5th Cir. 1965), also decided by that court. We decline to follow that case, which is inconsistent with *Loffland*, because the district court in *Romero* relied on decisions which are inapposite to the question presented here, namely, whether a plaintiff may sue his alleged employer-tortfeasor for damages after settling with an alleged third-party tortfeasor.[3] *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962); *McCarthy v. American Eastern Corp.*, 175 F.2d 127 (3d Cir. 1940), cert. denied, 333 U.S. 991 (1950); *Muise v. Abbott*, 160 F.2d 590 (1st Cir. 1947); *Smith v. Lykes Bros.-Ripley S.S. Co.*, 105 F. 2d 604 (5th Cir.), cert. denied, 308 U.S. 604 (1939). These decisions consider only the question whether a seaman, after recovering a judgment against his

---

[3]Moreover, *Romero* is distinguishable in one respect in that there the settling alleged tortfeasor was subrogated to the seaman's claims against his employer. The court refused to enforce such a subrogation on the ground that it was against public policy. In the case before us, the appellant did not subrogate McDermott to her claims against Seacraft.

employer based on the latter's negligence, can sue the same employer a second time under a separate and different cause of action for maintenance and cure. The question frequently arises because some items of loss, such as wages, may be recovered either as damages under a negligence claim or under a claim for maintenance and cure. See *Vickers v. Tumey*, 290 F.2d 426, 435 (5th Cir. 1961). Of course the same item may not be recovered twice under separate causes of action.[4] *Pacific Steamship Co. v. Peterson*, 278 U.S. 130 (1928). Whether the item is recoverable in the second suit depends on a resolution of the factual issue whether, under the facts of each case, the item was included in the recovery of the first suit. But these cases do not have any bearing upon the general rule that an injured person may partially settle a negligence claim with one of two alleged tortfeasors, sue and obtain a verdict for total damages against the nonsettling alleged tortfeasor, and receive judgment for the difference between the total damages and the settlement. *Loffland Bros. Co. v. Huckabee*, — F.2d —, *supra*; *Cudd v. Great Amer. Ins. Co.*, *supra*; *State Farm Mut. Auto. Ins. Co. v. Bourne*, *supra*.

Guidance as to the causes of action available to the appellant on remand if found in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). There the Supreme Court adhered to its decision in *Lind-*

---

[4]Muise v. Abbott, supra, involves the same principle. There the seaman first settled a negligence claim with an alleged third-party tortfeasor and then sued his employer under a separate cause of action for maintenance and cure.

gren v. United States, 281 U.S. 38 (1930), which had held that "in passing Sec. 23 of the Merchant Marine Act, 1920, now 46 U.S.C. Sec. 688 (1958 ed.), commonly called the Jones Act, Congress provided an exclusive right of action for the death of seamen killed in the course of their employment, superseding all state death statutes which might otherwise be applied to maritime deaths, and, since the Act gave recovery only for negligence, precluding any possible recovery based on a theory of unseaworthiness." 379 U.S. at 154. See also *Hassan v. A. M. Landry & Son., Inc.*, 321 F.2d 570, 571 (5th Cir. 1963), cert. denied, 375 U.S. 967 (1964). But see *Kenney v. Trinidad Corp.*, 349 F.2d 832, 840-841 (5th Cir. 1965) (dictum), cert. denied, 382 U.S. 1030 (1966). Furthermore, the Court noted that under Sec. 1 of the FELA, 45 U.S.C. Sec. 51, a right of recovery of damages for death is provided for the benefit of the surviving widow and children of a deceased employee. 379 U.S. at 156. And, the estate may claim damages for pain and suffering under a state survival statute preserving a "cause of action for unseaworthiness, which would not survive under the general maritime law." Id. at 157. These causes of action, since authorized by the Jones Act, are available to appellant against Seacraft only if the latter was decedent's employer, which Seacraft denies.[5]

---

[5]Since the complaint alleges that the injury occurred within Louisiana's maritime boundaries, reliance on the Death on the High Seas Act, 46 U.S.C. Secs. 761-767, would seem to be foreclosed even if that Act would otherwise be available in view of Gillespie. See Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966).

If the trial is to be a jury, we think that the better procedure is to withhold evidence of the settlement from the jury which will determine the total damages, if any, caused by Seacraft. The trial judge will deduct from the verdict the settlement payment to arrive at the amount which will adequately compensate the appellant.[6]

REVERSED AND REMANDED WITH DIRECTIONS.

---

[6] "We can say positively when [this] method is employed, that the jury has brought in a verdict in an amount which they believe will adequately and justly compensate the plaintiff, that the proper deduction has been made because the Judge himself in the judgment makes the proper deduction."

"The other method would be to place evidence before the jury, with instructions to render a verdict, less the amount received. It occurs to us that this latter procedure. . . . [is undesirable] because, who would be able to positively say if the latter method were adopted, that the jury actually estimated the injury to the plaintiff and then deducted what he had already received." State Farm Mut. Auto. Ins. Co. v. Bourne, supra, at 923.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1967

No. 648

NEWELL H. SMITH, JR.,
Petitioner,

versus

NOBLE DRILLING CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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New Orleans, Louisiana 70112
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RESPONDENT

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New Orleans, Louisiana

TABLE OF CONTENTS

	Page
STATEMENT OF CASE	1
QUESTIONS PRESENTED	5
REASONS FOR DENYING PETITION	5
ARGUMENT	6
CONCLUSION	14
CERTIFICATE	15
APPENDIX "A"	17
APPENDIX "B"	27
APPENDIX "C"	34
APPENDIX "D"	47
APPENDIX "E"	49

INDEX OF AUTHORITIES

Cases:

Benson v. Jackson, 238 F. Supp. 309 (E. D. Penn., 1965) 11

Billiot v. Sewart Seacraft, Inc., 382 F. 2d 662 (5th Cir., 1967) 8

Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 72 S. Ct. 277 S. Ct. (1952) 5

Loffland v. Huckabee, 342 U. S. 282, 96 L. ed 318, 72 S. Ct. 277 S. Ct. (1952) 9

Lovejoy v. Murray, 70 U. S. 1, 18 L. Ed. 9, (3rd Cir., 1949) 11

INDEX OF AUTHORITIES (Continued)

Page

McCarthy v. American Eastern Corporation, 175 F. 2d 727, (3rd Cir., 1949) 11

Petition of Oskar Tiedeman and Company, 367 F. 2d 498 (3rd Cir., 1966) 11

Romero v. Frank's Casing Crew and Rental Tools, Inc., 229 F. Supp. F. 2d 999 (5th Cir., 1964) .. 6

Smith v. Lykes Brothers - Ripley S. Co., 105 F. 2d 604, 606-607, (5th Cir., 1939) 6

TREATISES:

Corpus Juris Secundum-Release Sec. 50, P. 681-682 13

Harper and James, The law of Tort, Sec. 10.1 P. 710-714 8

Prosser on Torts, 3rd Ed., P. 268 and 269 13

Williston on Contracts 3rd Ed. Sec. 338A, P. 772 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No.

NEWELL H. SMITH, JR.,

Petitioner,

versus

NOBLE DRILLING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action arises out of an injury to a roustabout, Newell H. Smith, employed by Service Contracting, Inc., which occurred on a stationary oil drilling platform located about 30 miles out into the Gulf of Mexico, off the coast of Louisiana, on December 11, 1962. The drilling operations conducted from the stationary platform were supported by a tender, a converted Navy LST. Both the tender and platform were owned by the California Company. Service Contracting, Inc., had been hired by the California Company to provide roustabout labor to assist in the operations of the tender and to handle the loading and unloading of equipment between the platform and tender. Newell Smith was

injured while handling equipment on the platform being transferred from the tender, his injuries consisting of a fracture to his ankle. Noble Drilling Corporation was the drilling contractor hired by the California Company to perform the actual drilling from the platform. Noble supplied the drilling rig and the personnel to operate that equipment.

Smith originally filed a libel in the United States District Court, in New Orleans, against Service Contracting, Inc., his employer, The California Company and Rowan Drilling Company. By amended libel Noble Drilling Corporation was substituted as a respondent in place of Rowan Drilling Company.

In that action, the libellant cumulated his claims against the respondents, seeking recovery under the Jones Act and the General Maritime Law for unseaworthiness and tort. He particularized a maintenance and cure claim only against Service Contracting, Inc., his employer.

Service Contracting, Inc., attempted to get the libel dismissed through summary judgment action on the basis that Newell Smith had accepted an award of $3,550.54, from the Deputy Commissioner, administering the Longshoremen and Harbor Worker's Compensation Act and, therefore, could not proceed further against his employer. After hearings, the motion was dismissed by Judge Ainsworth who held that there had been no adverse hearing before the Deputy Commissioner, the libellant not being represented at the time and therefore libellant's rights had not been ad-

judicated. Thereafter, in an attempt to set his claims tried on a earlier date, Smith filed a second suit in the State District Court against the same parties who had been made respondents in the Federal Court proceedings alleging essentially the same claims, those being under the provisions of the Jones Act and General Maritime Law of the United States and a second and separate cause of action for maintenance and cure against his employer, Service Contracting, Inc. (Appendix A)

Subsequently, for reasons unknown, the plaintiff voluntarily dismissed the California Company from the suit, leaving therein Service Contracting, Inc. and its insurer, Liberty Mutual Insurance Company, Noble Drilling Corporation and its insurer, Aetna Casualty and Surety Company.

In May, 1965, the petitioner entered into a compromise agreement with Service Contracting, Inc. and its insurer, Liberty Mutual Insurance Company, whereby the plaintiff received the sum of $20,500.00. In addition to the $20,500.00 he acknowledged receipt of $3,550.00, an amount previously paid to the petitioner by Liberty Mutual as compensation, and termed as maintenance, and $837.00 for medical expenses. He then granted a Release to *Service Contracting, Inc. and Liberty Mutual Insurance Company* in "full and final settlement of all claims." (Appendix B)

After the settlement, Noble Drilling Corporation filed in State Court a third party complaint against Service Contracting, Inc. seeking judgment over and against

Service Contracting, Inc. and Liberty Mutual Insurance Company in the event that Noble and Aetna were cast in judgment.

Noble Drilling Corporation and Aetna Casualty and Surety Company then filed a motion for summary judgment on the grounds that the petitioner, having recovered once for his injury and having accepted money in full settlement of his suit against Service Contracting, Inc., he could not now recover against Noble Drilling Corporation and Aetna Casualty and Surety Company for the same causes of action. Further, the motion for summary judgment, alternatively, was based on the theory that there was no genuine issue between the parties to permit the plaintiff to recover under the Jones Act since the fact unquestionably disclosed that the plaintiff at the time of his injury was in the employ of Service Contracting, Inc.

Newell Smith in reply to the third party complaint filed by Noble, moved to strike the third party complaint on the basis that since there was no contract between Service Contracting, Inc. and Noble Drilling Corporation there could be no contractual indemnity owed and under General Maritime Law there was no right of contribution except in collision cases.

After hearing both motions, Judge Cassibry first dismissed Noble's third party complaint and at the same time dismissed Smith's petition.

In his reasons for judgment, Judge Cassibry concluded that the motion to strike the third party peti-

tion filed by Smith was governed by the decision of *Halcyon vs. Haenn Ship Ceiling and Refitting Corporation*, 342 U.S. 282, 96 L.ed. 318, holding that there was no right of contribution nor indemnity in cases of this nature.

Further, in his reasons, he concluded that the motion for summary judgment as to the Smith's petition was controlled by the decision of *Romero vs. Frank's Casing Crew and Rental Tools, Inc.* 229 Fed. Supp. 41 (D.C. La. 1964) Affirmed 342 Fed 2nd 999 (5th Cir., 1964).

QUESTIONS PRESENTED

May a claimant, after receiving full satisfaction for all claims that he may have against one tort feasor, then proceed against another tort feasor for the identical items of damage?

REASONS FOR DENYING THE PETITION

1) He has recovered in full satisfaction for his injury for the sum of $25,000.00.

2) The State Court in the instant case followed the decisional law *emanating* from the decision of *Romero vs. Frank's Casing Crew, etc.*, 229 F. Supp. 41, affirmed Per curium 342 F. 2d 999 which held that a petitioner may recover only once for his injuries.

ARGUMENT

The elements of damages claimed by Newell Smith in his suit against Service Contracting, Inc., Liberty Mutual Insurance Company and The California Company were the same as are claimed in the action against Noble Drilling Corporation and Aetna Casualty and Surety Company, except that there was one more cause of action alleged against Service Contracting, Inc. which was not claimed against Noble and Aetna, that being for maintenance and cure.

The purported reservation of Jones Acts Rights and Tort Rights in the settlement agreement made between the petitioner and Services Contracting, Inc., and Liberty Mutual was meaningless where the plaintiff already had full recovery for the same elements of damage.

It is without doubt that there can never be a double recovery for the same elements of damage for the same injury. The Fifth Circuit Court of Appeals in Smith vs. Lykes Brothers — Ripley S. Co., 105 F. 2d 604, 606-607 (Fifth Circuit, 1939), discussed this situation and stated: "The appellant had the right to sue first for damages in tort, omitting all items and demands for failure to provide maintenance and cure, and then to bring the present action, arising out of the breach of duty incident to this contract for wages, *but he did not have the right to be compensated twice for the same elements of damage.*" (Emphasis Added)

A reading of the language of the receipt and release

executed by the parties to the agreement conclusively shows that the petitioner received the $25,000.00 from Service Contracting, Inc. and Liberty Mutual Insurance Company to discharge them and all other parties, excepting Noble and Aetna, for all claims or elements of damage asserted against them in that suit and it is submitted, therefore, that Smith, has no element of damages of any nature to assert against Noble and Aetna. Counsel for petitioner seeks to distinguish the instant case from Romero by stating that the trial Judge in Romero as a matter of fact found that the seaman had recovered all the damages which he was entitled to. The opinion in Romero shows that the Court based its decision upon the fact that "the items of damages claimed in the first suit, No. 8949, included the very same items which are claimed in the cause of action now before the court for maintenance and cure, namely board, lodging, medical and surgical expenses, as are the items of damages claimed in this suit for mental anguish, pain and suffering, loss of earning capacity, loss of past and future wages, etc."***

"We take Judicial Cognizance of the claims advanced by the pleadings in the original suit filed in this court and of the answer of the defendant wherein the damages set forth above under our Paragraph 4, were put at issue by the defendants." ***

"That that suit has been released and settled in full, consequently all of the claims put forth by the plaintiff have been satisfied."

This was "factual finding" made in Romero, and was the "factual finding" in the instant case. The Romero decision is consistent with cases relating to releases, in light of the basic doctrine underlying these type cases, namely *that an injured party may have but one satisfaction for a single injury.* Vol. II. Williston on Contracts Third Edition, Section 338A, Page 722. See also Harper and James, the Law of Tort, Section 10.1, Page 710 through 714.

Counsel for the petitioner states that there have been two subsequent cases from the Fifth Circuit which have rejected the Romero holding. It is submitted that this is an incorrect statement of the law. In Billiot Vs. Sewart Seacraft, Inc., 382 F. 2d 662 (5th Cir. 1967), the court had a case which was significantly different from the instant suit.

Billiot was a death case in which the claimant was the decedent's wife. The claimant in Billiot had sued several parties including her husband's employer, Seacraft. Prior to the trial in Billiot, the claimant settled with all of the parties with the exception of her husband's employer for the sum of $21,075.00. In Billiot the wife of the deceased, clearly had not received full compensation for the death of her husband. Further the causes of action which she asserted against the third parties were of a far different nature than those upon which she could allege against her husband's employer. The claims that she could make against the other parties would be under negligence and maritime tort whereas her claims against her husband's em-

ployer would certainly include Jones Act Remedies and unseaworthiness.

There could be no doubt that Mrs. Billiot intended her settlement with J. Ray McDermott, the third party tort-feasor, to be only a "partial settlement" of her claims. The record in Billiot at the Court of Appeals shows conclusively that her settlement was to be only a partial settlement. Page 26, Paragraph II states:

> "Petitioner, as administratrix of the succession of Chester Billiot, has petitioned the court in said succession for authority to *partially* settle a certain cause of action * * *"

(See Appendix E.)

At this point it may be well to comment that in rendering the decision of the Fifth Circuit in the Billiot case, Judge Hutcheson in referring to the Loffland case and describing the litigation said: "In advance of trial, the plaintiff settled all the claims against his employer for $11,000.00. Rather than holding that this settlement was all that the plaintiff was entitled to receive for his injuries, the court allowed the claim for damages against Loffland to proceed to trial. The jury found that Loffland was liable to the plaintiff for $42,500.00."

The record of Loffland indicates that the issue presented in Romero was not presented to the lower court and it was not until and after the jury returned the verdict, on appeal, did Loffland raise the Romero principle as a defense. The court of appeals for the Fifth

Circuit in rendering its decision in Loffland made no comment on the defense asserted. To assume, as petitioner has done, that the Fifth Circuit in Loffland renounced the Romero principle is, therefore, speculation since the district court was not called upon to find that as a matter of law the plaintiff there could not recover on the same claims for the same injury.

The Romero decision is clearly distinguishable upon the facts from the Loffland and Billiot decisions.

The Romero case was the classic example of an attempt to obtain double recovery in that the items of damage claimed by Romero in his first suit against the third party tort-feasor were identical as the items of damage claimed by him in his second suit against his employer.

Newell Smith has made the identical attempt at "double recovery" in the instant case. Mr. Smith filed his suit against his employer, Service Contracting, Inc., and Noble alleging a claim under the Jones Act and under the general maritime law. Smith also alleged in a separate and second cause of action a claim for maintenance and cure against his employer, Service Contracting, Inc. He then proceeded to settle his case for approximately $25,000.00 with his employer, Service Contracting, Inc., in "full and final settlement of all claims." (See Ex. B — Affidavit)

The agreement made by Smith released Service Contracting, Inc. and its insurer, Liberty Mutual, from "any liability under the Jones Act, 46 USC 688, the

general maritime law, the Louisiana Workmen's Compensation Statute, Article 2315 of the Louisiana Revised Civil Code, or any other Federal or State Statutes, or in common law or in equity, together with all hospital, medical, surgical and incidental expenses; and particularly any claim or claims for wages and/or maintenance and cure." Page 2 of the release. (See App. B. p. 28)

Here, as in Romero, the petitioner is trying to claim the identical items of damage against another potential tort feasor, for which he has already been paid $25,000.00. The Supreme Court of the United States as early as 1866 recognized the general principle that:

"A party receiving an injury from the wrongful acts of others is entitled to but one satisfaction and in accord and satisfaction by, for a release or other discharge of, one of two or more tort feasors, is a discharge of all." Lovejoy Vs. Murray, 70 U. S. 1, 18 L. Ed. 9, 3 Wall 1; See also Benson Vs. Jackson, 238 F. Supp. 309 (E. D. Penn., 1965.)

This principle has been followed by other courts in McCarthy Vs. American Eastern Corporation, 175 F. 2d 727, (3rd Cir., 1949); Petition of Oskar Tiedemann and Company, 367 F. 2d 498 (3rd Cir., 1966).

Smith collected $25,000.00 for all the claims or elements of damage asserted in the petition and we submit, therefore, that he has no element of damages of any nature to assert against Noble and Aetna as a matter of law.

We submit that Loffland and the Billiot cases have not either expressly or impliedly overruled the holding in Romero.

As the Court stated in Billiot at Page 26 of petitioner's brief: "Of course, the same item may not be recovered twice under separate causes of action. Pacific Steamship Company Vs. Peterson, 278 U. S. 130 (1928). Whether the item is recoverable in the second suit depends upon a resolution of the factual issue whether, under the facts of each case the item was included in the recovery of the first suit." There can be no doubt that Smith in the instant case, did allege in his petition against Service Contracting, Inc., all causes of action that he might have had against any tort feasor and so released Service Contracting in full settlement in all of these causes of action.

Therefore, the decision in Romero, as well as Billiot would bar any recovery by Smith of a double recovery for the same causes of action against Noble and Aetna

Underlying the question the Supreme Court is here called upon to determine is the question what is the admiralty rule to be applied in such a case.

In Halcyon Lines vs. Haenn Ship C & R Corporation, 342 U S 282, 96 L ed 318, 72 S Ct 277, decided by this court in 1952, the court in making a determination as to whether or not in admiralty and in other than collision cases whether or not there was a right of contribution among joint tort-feasors. The court held that

there was no such right to contribution based on the common law rule extending back for centuries.

It is submitted that the original common law rule concerning the release of one tort-feasor, which is still recognized in many of the states of the United States, is that a release of one joint tort-feasor releases all of them even if there is an express reservation of the releasors' rights against the tort-feasor or tort-feasors who are not parties to the release. The rule is based on the view, as was the view in Romero, that there can be but one compensation for a joint wrong and that the cause of action is satisfied once the injured party is payed for his injury by one of the joint tort-feasors. See 73 ALR 2nd 403 et seq. See also Corpus Juris Secundum-Release Sec. 50, pages 681-682; Prosser On Torts, Third Edition, pages 268 and 269.

This common law rule is set forth in 73 ALR 2nd 403 et seq.:

> "The strict common law rule is to the effect that an express reservation in a release of one joint tort-feasor, of the wrong party's cause of action against the remaining tort-feasors, is ineffective and does not prevent the release of one joint tort-feasor from operating to discharge the others."

CONCLUSION

For the foregoing reasons, this Petition For Certiorari should be denied and the decision of Judge Cassibry in this case and the affirmance by the higher courts of Louisiana is correct on the basis that Newell Smith is attempting to do nothing more than make a double recovery for the same injury. The law is settled that double recovery is not allowed. Further, the rule of common law dictates that a release of one joint tortfeasor releases all. The application for writs should be denied.

All of which is

Respectfully submitted,

W. FORD REESE

BY:_____

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Brief in opposition to the Petition for Certiorari have been served upon petitioner, Newell H. Smith, Jr., by depositing the same, postage prepaid, in the United States mail, addressed to Sam C. Gainsburgh, Esq., c/o Kierr and Gainsburgh, Attorneys at Law, 1718 National Bank of Commerce Building, New Orleans, Louisiana, 70112, at New Orleans, Louisiana, this _____ day of January, 1968.

W. Ford Reese
847 National Bank of
Commerce Building
New Orleans, Louisiana 70112

APPENDIX

App. A The petition filed by Newell Smith

App. B The receipt and Release given by Newell Smith

App. C The full decision of Romero Vs. Frank's Casing Crew

App. D The affirmation of Romero Vs. Frank's Casing Crew in the Fifth Circuit Court of Appeals.

App. E Trial Transcript of Billiot or Sewart Seacraft, p. 26.

APPENDIX "A"

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 424-272, Division " ", Docket 4

NEWELL H. SMITH, JR.,
Petitioner

versus

SERVICE CONTRACTING, INC.,
THE CALIFORNIA COMPANY,
NOBLE DRILLING COMPANY,
AETNA CASUALTY AND SURETY COMPANY and
LIBERTY MUTUAL INSURANCE COMPANY,
Defendants.

CLAIM FOR DAMAGES BY SEAMAN
UNDER JONES ACT AND
GENERAL MARITIME LAW
(A Jury is Requested)

Filed: June 12, 1964
A. Copeland, Dep. Cl.

TO THE HONORABLE, THE JUDGES OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA:

The petition of Newell H. Smith, Jr., of lawful age

and a resident of Gretna, Jefferson Parish, Louisiana, through his undersigned counsel, respectfully alleges and shows that:

1.

Service Contracting, Inc., hereinafter called SCI, a Louisiana corporation having its principal business establishment in Jefferson Parish, Louisiana; The California Company, hereinafter called California, a foreign corporation having its principal business establishment in the Parish of Orleans, State of Louisiana; Noble Drilling Company, hereinafter called Noble, a foreign corporation having its principal business establishment in the Parish of Orleans, State of Louisiana; Aetna Casualty and Surety Company and Liberty Mutual Insurance Company, foreign insurers but authorized to do and doing business within the State of Louisiana and within the jurisdiction of this Honorable Court; are justly and truly, indebted unto your petitioner in the full sum of $130,000.00 as damages and up to the sum of $5,000.00 as maintenance, with interest on all amounts due from the date of judicial demand until paid, and all costs of these proceedings, for the following, to-wit:

2.

At all times pertinent hereto California owned and jointly operated, along with SCI and Noble, a certain American flag merchant vessel known as the M/V S-24 and employed the said vessel upon navigable

waters of the United States, as well as those of the Gulf of Mexico.

3.

At all times pertinent hereto the said M/V S-24 was capable of and being used in the mission and purpose of aiding and assisting in the exploration of oil, which was the overall mission and purpose of said vessel.

4.

At all times pertinent hereto, petitioner was employed by the defendants as a member of the crew of the M/V S-24, which he joined at Venice, Louisiana, on or about November 25, 1962, in a capacity which contributed to the overall mission and purpose of said vessel, at wages of approximately $160.00 per week, plus found while on duty.

5.

On or about December 11, 1962, while the M/V S-24 was some thirty miles seaward of Venice, Louisiana, afloat in the Gulf of Mexico, at approximately 10:30 PM, petitioner was ordered by one of his superiors aboard the vessel to leave the M/V S-24 and to go upon the oil-well drilling platform which the M/V S-24 was actively engaged in tending for the purpose of unloading a piece of equipment from the M/V S-24 onto the said platform.

6.

At the aforementioned date and time, there were winds blowing between thirty-five and forty-five miles per hour, with nine to twelve foot seas, air temperature approximately twenty-eight degrees and the M/V S-24 was rolling and pitching at her anchors.

7.

Petitioner, pursuant to his said orders, made his way over the main deck of the M/V S-24, boarded the gangway and went on to the platform, where he took up a position appropriate to receive the equipment which was to be hauled from the M/V S-24.

8.

By means of a cargo net, other members of the vessel's crew attempted to load and to hoist, with the booms and winches and other controls of the M/V S-24, the load of the equipment, weighing approximately five hundred pounds, including the cargo hook, the net, its attachments, and the equipment being loaded from the M/V S-24 onto the drilling platform.

9.

In the process of hauling the load as aforesaid the said load was caused, allowed and/or permitted by persons other than the petitioner who had no control over said load to foul a joint of five-inch drill pipe which was racked on the said platform and to pull the said

joint of the pipe from its place of storage onto petitioner, thereby causing petitioner to suffer the personal injuries and damages hereinafter mentioned.

10.

The aforesaid incident proximately and solely resulted from the joint and concurrent negligence, carelessness and inattention of the defendants California, Noble and SCI, their agents, servants, employees and each of them, particularly, but not exclusively, in the following respects, to-wit:

a) In failing to provide petitioner with a reasonably safe place to work;

b) In failing to have due and proper regard, in the management and operation of the M/V S-24 for the safety of the petitioner, and others, by requiring petitioner to expose himself to the dangers of injury from the hauling of heavy loads of equipment and gear in rough and boisterous weather, when the operation in which petitioner was ordered to engage was not being carried out for the safety of the vessel, her cargo or her crew;

c) In failing to provide petitioner with a sufficient number of competent co-employees and superior officers, to accomplish the reasonably safe conduct of petitioner's work aboard and adjacent to the M/V S-24;

d) In failing to promulgate and to enforce proper rules for the reasonably safe conduct by petitioner, as well as others aboard the said vessel, of their work aboard the said vessel;

as well as from the unseaworthiness of the M/V S-24 in the particulars heretofore mentioned in addition to any others which may be shown upon the trial of this cause.

11.

As a proximate result of the aforementioned incident, petitioner was caused to be battered and bruised about his body and extremities and to sustain a crushing type fracture of his left leg in the area of his left ankle, as well as other injuries to the soft tissues in that area, the joint space and other injuries, including traumatic arthritis.

12.

As a further proximate result of the aforementioned injuries, as well as their complications, petitioner was required to undergo surgery for the open reduction and fixation of his fractured leg, to spend a long period of time in a plaster cast, upon crutches and under active medical care and attention, particularly, during the period from December 12, 1962 through May 31, 1963.

13.

By reason of the foregoing, petitioner further has lost sums which he would otherwise have earned in gainful employment, his earning capacity and employment horizons have diminished, he has suffered, is suffering and will continue to suffer severe pain and mental anguish, as well as physical disability and loss of life's pleasures as a result of the aforementioned injuries, their complications, treatment and residuals, which said residuals, petitioner believes, and hence avers, are permanent, and, in all probability, will become worse.

14.

Petitioner's damages are itemized as, but not limited to, the following:

Future medical expenses	$ 5,000.00
Permanent disability	50,000.00
Accrued and future time and earning loss	50,000.00
General damages	25,000.00
TOTAL	$130,000.00

15.

The defendants, Liberty Mutual Insurance Company and Aetna Casualty and Surety Company, are the liability insurers of SCI and Noble, respectively, and are therefore made parties herein.

16.

Petitioner brings this cause of action against the defendants pursuant to the provisions of the Jones Act and the General Maritime Law of the United States.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, YOUR PETITIONER FURTHER RESPECTFULLY ALLEGES AND SHOWS THAT:

17.

Your petitioner realleges, reavers and herewith incorporates by reference each and every allegation heretofore set forth in his first cause of action as though the same were specifically alleged, insofar as they may be pertinent hereto.

18.

Upon petitioner's becoming injured, lame and disabled in the service of the M/V S-24, it became the duty of SCI to provide the petitioner with maintenance and cure.

19.

To date, SCI has provided petitioner with cure, in the form of payments for the medical attention necessitated by his above described injuries, and, in addi-

tion, petitioner has received certain weekly benefits at the rate of $64.85 per week.

20.

In view of the foregoing, petitioner alleges that he is entitled to recover of SCI, maintenance and cure, in such amounts as he may be found by this Honorable Court to be entitled to receive, up to the time of the trial hereof, less due and proper credit to the defendant, SCI, for the aforementioned amounts already paid to petitioner, all without prejudice to 'petitioner's rights to recover whatever maintenance and cure he may become entitled to receive subsequent to the time of the trial of this cause.

21.

Petitioner brings this second, separate and distinct cause of action against the defendant, SCI, pursuant to the General Maritime Law of the United States.

WHEREFORE, petitioner, Newell H. Smith, Jr., prays that the defendants be served with a copy of this petition and be duly cited to appear and answer hereto, according to law, and that, after all legal delays and due proceedings had, your petitioner may have judgment and decree of this Honorable Court in the sum of $130,000.00 as damages against the defendants California, Noble and SCI, jointly and in solido, and up to the sum of $5,000.00 as maintenance and cure, without prejudice to your petitioner's rights to recover such maintenance and cure as he may become entitled to

receive subsequent to the time of trial hereof, against the defendant SCI, together with interest on all amounts recovered by your petitioner from the date of judicial demand until paid, and all costs and disbursements of this action; and

Your petitioner further prays for all such other and further general and equitable relief as to this Honorable Court may seem just and proper in the premises, and for a trial by jury.

KIERR AND GAINSBURGH
SAMUEL C. GAINSBURGH
ROBERT G. HEBERT
(Signed) ROBERT G. HEBERT
ROBERT G. HEBERT (T.A.)
1740 National Bank of
Commerce Building
New Orleans, Louisiana 70112
522-2304

PLEASE SERVE:
The California Company through
C. T. Corporation System
620 Hibernia Building
New Orleans, Louisiana

Noble Drilling Company through
C. T. Corporation System
620 Hibernia Building
New Orleans, Louisiana

Service Contracting, Inc.
1225 Peters Road
Harvey, Louisiana

Aetna Casualty and Surety Company
through Secretary of State

Liberty Mutual Insurance Company
through Secretary of State

APPENDIX "B"

RECEIPT AND RELEASE

KNOW ALL MEN BY THESE PRESENTS:

That, for and in consideration of the sum of TWENTY THOUSAND FIVE HUNDRED and no/100 ($20,500.00) DOLLARS, cash in hand, paid by *Service Contracting, Inc.* and *Liberty Mutual Insurance Company*, receipt of which is hereby acknowledged and due acquittance and discharge therefor granted, the said Newell Smith, Jr., does by these presents, release, remise and forever discharge Service Contracting, Inc., Liberty Mutual Insurance Company, the California Company, their respective officers, agents, servants, employees, insurers and indemnitors and the vessel S-24, together with its master, members of the crew, its owners, officers, agents, underwriters and indemnitors, and any other person, firm or corporation, and any other vessel or vessels (with the only exception to the foregoing being that Newell Smith, Jr. specifically reserves his rights against Noble Drilling Corporation and Aetna

Casualty and Surety Company), of and from any and all liability arising out of a certain accident that occurred on or about December 11, 1962, while the said Newell Smith, Jr. was performing duties of his employment while working for Service Contracting, Inc. as a seaman and member of a crew of the S-24, when said tender the S-24 was alongside a platform in the Gulf of Mexico, designated as B Structure Main Pass, Block 41, when Newell Smith, Jr. was in the process of assisting in transporting a piece of equipment in a cargo net from the tender to the platform, and Newell Smith, Jr. was stationed on the platform, and the cargo net caught on a piece of drill pipe, which drill pipe struck Newell Smith, Jr. in the left ankle region, which accident caused injuries to Newell Smith, Jr. consisting of a bimalleolar fracture with displacement of the medial mallsolus, which has left permanent residual disability, together with injuries to other parts of his body, left leg and ankle region, and connected directly or indirectly therewith including but without limitation "any liability under the Jones Act, 46 U.S.C. 688, the General Maritime Law, the Louisiana Workmen's Compensation Statute, Article 2315 of the Louisiana Revised Civil Code, or any other Federal or State Statutes, or in common law or in equity, together with all hospital, medical, surgical and incidental expenses; and particularly any claim or claims for wages and/or maintenance and cure."

IT IS AGREED that the settlement of TWENTY THOUSAND FIVE HUNDRED and no/100 ($20,500.00) DOLLARS paid to the said Newell Smith, Jr. by Service Contracting, Inc. and Liberty Mutual Insurance

Company is hereby accepted by the said Newell Smith, Jr. without any admission of liability on the part of anyone, and the said payment and compromise is made solely for the purpose of compromising any existing claim or claims that the said Newell Smith, Jr. may have against said parties or any other third party or parties or vessels, together with their respective officers, agents, servants, employees, including owners, masters and crew members of the vessel or vessels, or that the said Newell Smith, Jr. may have in the future against these parties, connected directly or indirectly with his alleged injuries as heretofore described, (the only exception being that the rights of Newell Smith, Jr. are specifically reserved against Noble Drilling Corporation and Aetna Casualty and Surety Company).

IT IS UNDERSTOOD that the injuries of the said Newell Smith, Jr. may be, or may grow worse than they now seem to be and the said Newell Smith, Jr. certifies that he has discussed fully all of his possible rights under the Jones Act, the General Maritime Law, as well as under all compensation statutes with his attorneys, and that he fully understands all of these rights, and that this action on his part is a free and voluntary action after due deliberation and on the advice of his attorney.

"The said Newell Smith, Jr. does hereby acknowledge that he has been paid the amount of THREE THOUSAND FIVE HUNDRED FIFTY and 54/100 ($3,550.54) DOLLARS during the period of recovery, which payment constitutes the payment in full of all

maintenance that he was entitled to receive for his injuries. That based upon his own knowledge and the advice of his doctors, he has reached the point of maximum recovery and *that therefore he makes no further claim for maintenance and cure.*" He additionally states that all sums due and owing him for cure have been paid, and that during his treatment the amount of $837.86 was paid for his medical expenses.

THE SUM of TWENTY THOUSAND FIVE HUNDRED and no/100 ($20,500.00) DOLLARS is received by the said Newell Smith, Jr. in full, complete and final settlement of the suit pending in Civil District Court, Parish of Orleans, #424-272, Newell Smith, Jr. hereby instructs his attorney to dismiss said suit with prejudice. Additionally, the said Newell Smith, Jr. certifies that, with the exception of the above referred to case, that there is no other suit presently pending on his behalf against any party for the injuries herein referred to. The said Newell Smith, Jr. specifically reserves all right or action and/or claims which he may have under any State or Federal Statute, in tort, in admiralty, in common law or the General Maritime Law, or otherwise, against Noble Drilling Corporation and Aetna Casualty and Surety Company, growing out of the accident which occurred on December 11, 1962 as above described.

An additional consideration for the payment of the above sum to him and without which this settlement would not have been made, the said Newell Smith, Jr. for himself, his heirs, executors, administrators and assigns, does hereby agree to defend "*and to indemnify*

and hold harmless each of the parties beneficiary namely Service Contracting, Inc., Liberty Mutual Insurance Company, The California Company, and the S-24, their owners, servants, employees, etc. hereof from any and all claims, demands and cause of action of whatever nature or character, or which may hereafter be asserted by Noble Drilling Corporation and/or Aetna Casualty and Surety Company, their heirs and assigns, claiming by, through or under him, or arising out of or resulting from or in any manner connected with the injuries alleged to have been sustained by Newell Smith, Jr. as the result of the accident on December 11, 1962, including any claim that may be made by these parties claiming indemnity, contractual or otherwise, or claiming contribution, or otherwise. Without limiting the foregoing, it is agreed that, in the event Noble Drilling Corporation and/or Aetna Casualty and Surety Company, their heirs or assigns, shall make claim against the parties beneficiary of this release for indemnity, contribution or otherwise and in the event that it should be found that Service Contracting, Inc., Liberty Mutual Insurance Company, The California Company and/or the S-24, their owners, servants, employees, etc. are obligated to indemnify the said Noble Drilling Corporation and/or Aetna Casualty and Surety Company or to contribute in any sum whatsoever, then Newell Smith, Jr. agrees to indemnify and save harmless Service Contracting, Inc., Liberty Mutual Insurance Company, The California Company, and/or the S-24, their owners, servants, employees, etc. from and against all claims of and liabilities they may have to Noble Drilling Corporation and/or Aetna Casualty and Surety Company. In the

event any claim is made against Service Contracting, Inc., Liberty Mutual Insurance Company, The California Company, and/or the S-24, their owners, servants, employees, etc. by Noble Drilling Corporation and/or Aetna Casualty and Surety Company, their heirs or assigns, whether it be well-founded or not, Newell Smith, Jr. agrees to defend any such suit or claim, and to pay all costs incurred and all fees incurred in the defense of said claims or suits.

_____

NEWELL SMITH, JR.

WITNESSES:

_____

_____

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a notary public, duly commissioned and qualified, personally came and appeared:

NEWELL SMITH, JR.

who, after being duly sworn, did depose and say:

That he is the person who executed the above and foregoing receipt and release; that he has read same and fully understands it; that all of his rights, under the Jones Act, General Maritime Law, including maintenance and cure and the warranty of seaworthiness

have been fully explained to him by his attorney, and that he fully understands all of these rights, "and *that his attorney has recommended to him that he accept the amount stated in said release in full and final settlement of all claims;* that he has on the basis of the advice of his attorney, signed said release and executed it as his own free act and deed.

_____

NEWELL SMITH, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS _____ DAY
OF _____, 1965.

_____

NOTARY PUBLIC

APPENDIX "C"

Linake J. ROMERO and Fidelity Casualty Company of New York

v.

FRANK'S CASING CREW & RENTAL TOOLS, INC., Hartford Accident & Indemnity Company and Lloyd's of London.

Civ. A. No. 9595.

United States District Court
W. D. Louisiana,
Lafayette Division.
April 30, 1964.

Suit by crew member against former employer, under Jones Act and for unseaworthiness under general maritime law, joined with claim for maintenance and cure. On motions by the former employer to dismiss as to both the plaintiff employee and an insurance company plaintiff and for judgment on the pleadings, and on motion by the same defendant for summary judgment, the District Court, Putnam, J., held that plaintiff could recover only once for any one injury, and having accepted money in settlement of his maritime tort suit against oil companies for whom offshore work was being done by a casing contractor which supplied a crew including plaintiff, he could not recover again under the Jones Act, despite a subrogation agreement which was part of the settlement.

Motions sustained.

1. Federal Civil Procedure — 1055, 1835

For purpose of motion for judgment on pleadings and motion to dismiss for failure to state a claim, allegations of petition are taken as true.

2. Seamen — 29(5.1)

If plaintiff was seaman he could proceed against employer under Jones Act for damages for injuries and for maintenance and cure, could sue owners and operators of offshore rig or drilling barge, on which he sustained injury, in maritime tort for damages for his injuries, or he could sue owners of rig as third-party tortfeasors under maritime law for personal injuries and his employer for maintenance and cure. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

3. Compromise and Settlement — 16(1)

Plaintiff could recover only once for any one injury, and having accepted money in settlement of his maritime tort suit against oil companies for whom offshore work was being done by casing contractor which supplied crew including plaintiff, he could not recover again under Jones Act, despite subrogation agreement which was part of settlement. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Evidence — 43(3)

District Court in deciding alleged seaman's claim under Jones Act took judicial cognizance of claims advanced by pleadings in alleged seaman's original suit in maritime tort against oil companies to whom a casing crew, including plaintiff, was being furnished by contractor for offshore work. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

5. Insurance — 607

Public policy precluded giving effect to subrogation agreement whereby insurers of oil companies to whom casing crew had been furnished by contractor for offshore work would be subrogated to crew member's claim under Jones Act against contractor, where crew member had already made recovery in maritime tort action against oil companies. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

6. Seamen — 29(5.1)

Remedy given to seamen by Jones Act is exclusive against their employers for negligence. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

———•———

Levy & Burleigh, Lawrence K. Burleigh, Lafayette, La., for Romero.

Davidson, Meaux, Onebane & Donohoe, James E.

Diaz, Lafayette, La., for Fidelity Casualty Co. of New York.

Terriberry, Rault, Carroll, Yancey & Farrell, Francis Emmett, New Orleans, La., and Pugh & Boudreaux, Nicholls Pugh, Jr., Lafayette, La., for defendants.

PUTNAM, District Judge.

This purports to be a suit brought by Dinake J. Romero against his former employer, Frank's Casing Crew & Rental Tools, Inc., a Louisiana Corporation and its insurance carriers, Hartford Accident & Indemnity Company and Lloyd's of London, both foreign corporations, under the Jones Act, Title 46 U.S.C.A. § 688, and for unseaworthiness under the general maritime law. Joined with these demands is a claim for maintenance and cure. The Fidelity and Casualty Company joins with Romero as a plaintiff claiming the sum of $47,500.00 jointly with him, while Romero prays for judgment individually in the sum of $327,500.00 for injuries allegedly received while working on a submersible drilling barge in waters of the Gulf of Mexico some fifty miles from the coast of Louisiana.

We now consider motions by Frank's Casing Crew to dismiss as to both plaintiffs and for judgment on the pleadings, and a separate motion by the same defendant for summary judgment on grounds that Romero was not a seaman or member of the crew of any vessel.

We have concluded that these motions are good and they are sustained. From the pleadings and the evidence introduced on trial of the motions the following facts are undisputed:

(1) Plaintiff originally filed a suit in this court, for the very same accident, against Union Oil Company of California and its drilling contractor, the Offshore Company, this being civil action No. 8949 on the docket. In this complaint it was alleged that on November 8, 1961 he was injured while working on the drilling barge in question and that the accident was the direct result of negligence of the two defendants named in that suit. The suit sounded in maritime tort. The two defendants in suit No. 8949 filed a third-party action against Frank's Casing Crew, the substance of which is that Frank's had agreed to provide a five-man casing crew to Union Oil of California and agreed to indemnify and save this defendant harmless in connection with this operation from any loss or liability regardless of cause, directly or indirectly resulting from the performance of this agreement.

(2) Hartford, Insurance carrier for Frank's intervened in that suit alleging payments made to plaintiff Romero under the terms of the Longshoremen's and Harbor Workers' Compensation Act, as amended, Title 33 U.S.C.A. §901 et seq., for a total of $4165.00 in benefits paid to the time of filing of its petition in intervention, plus medical expenses totalling $673.28 on account of said accident. It prayed that its rights of subrogation be recognized and that it be paid by preference out of any amounts received by Romero as a result of that

suit. This intervention is still pending in Civil Action No. 8949.

(3) On July 2, 1963, on the joint motion of Romero, Union Oil and the Offshore Company, Romero's claims against those two parties and their claim under the third-party action mentioned above against Frank's Casing Crew were dismissed as of nonsuit. It is stated in this motion that "* * * movers anticipate filing or have filed a separate action jointly, against Frank's Casing Crew and Rental Tools, Inc., and the Hartford Accident and Indemnity Co., * * *".

(4) In suit No. 8949, Romero claimed full indemnity by way of damages for all losses resulting from the injury in question, including pain, anguish, loss of earning capacity, loss of wages, loss of board and lodging, medical and surgical expenses and hospital and medicinal charges.

(5) As part of the settlement agreement in Civil Action No. 8949 Romero executed what is termed a "subrogation and indemnity contract", whereby he acknowledged receipt of $47,500.00 cash as consideration for a release of Union Oil, Offshore Company, Pure Oil Company and their insurers, including Fidelity and Casualty and, according to the further provisions of this instrument, subrogated them to:

> "* * * all of his claims, causes or rights of actions which he may or might have against Frank's Casing Crew and Rental Service, Inc. and its insurer, including the Hartford Acci-

> dent and Indemnity Company, under the Jones Act and the Admiralty and Federal Maritime Laws of the United States, excluding therefrom all claims for maintenance and cure, transportation and that item of wages coming within the contractual right under maintenance and cure, and only up to the extent of the payment of Forty Seven Thousand Five Hundred and No/100 ($47,500.00) Dollars with the full understanding that appearer may or might proceed against Frank's Casing Crew and Rental Service, Inc., and the Hartford Accident and Indemnity Company and other insurers as to these other rights * * *."

Additionally, Romero agreed to indemnify and hold harmless these parties from any demands which may or might arise from the accident in question in favor of Frank's Casing Crew and Hartford as a result of their obligations to him under the Longshoremen's and Harbor Workers' Act. The entire agreement is introduced in evidence in the present suit, No. 9595, in support of the motions under consideration.

[1] (6) The defendants have not admitted that the structure upon which Romero was employed was a submersible drilling barge nor have they admitted that it was a vessel, but for the purpose of the motion for judgment on the pleadings and the motion to dismiss for failure to state a claim the allegations of the petition in this suit are taken as true. Consequently, we consider that for all purposes of these motions it is established as a fact that such was the case.

(7) Romero was the pusher or person in charge of the casing crew sent to the rig at the time of this accident.

CONCLUSIONS AND OPINION

[2] In the light of the foregoing facts, we have no difficulty in reaching a conclusion that the plaintiff in the present suit, No. 9595, has received full indemnity for the losses which he claims to have suffered by reason of this accident, in the first suit filed, No. 8949. Assuming arguendo that he was a seaman, he had a choice of remedies. He could proceed against his employer under the Jones Act for damages for his injuries and for maintenance and cure, or he could sue the owners and operators of the offshore rig or drilling barge in maritime tort for damages for his injuries, or, he could sue the owners of the rig as third-party tort feasors under the maritime law for personal injuries and his employer for maintenance and cure.

[3, 4] These rights are cumulative. Plaintiff can recover only once for any one injury. The items of damages claimed in the first suit, No. 8949, included the very same items which are claimed in the cause of action now before the Court for maintenance and cure, namely board, lodging, medical and surgical expenses and medicinal expenses, as are the items of damages claimed in this suit for mental anguish, pain and suffering, loss of earning capacity, loss of past and future wages, etc. which are claimed in the present suit in the Jones Act claim. Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (8 Cir. 1962); McCarthy v. American

Eastern Corp., 175 F.2d 727 (3 Cir. 1949), cert. denied, 338 U.S. 911, 70 S.Ct. 349, 94 L.Ed. 561 (1950); Muise v. Abbott, 160 F.2d 590 (11 Cir. 1947); Smith v. Lykes Bros.-Ripley S. S. Co., 105 F.2d 604 (5 Cir. 1939), cert. denied 308 U.S. 604, 60 S.Ct. 141, 84 L.Ed. 505 (1939).

In Handelsman, the Court said:

> "Appellee had two causes of action, one for maintenance and cure under the general maritime law, and the other for negligence under the Jones Act. The two rights were 'independent * * * consistent and cumulative.' The trial court found in appellee's favor on both, and that determination has been sustained here. *Appellee was therefore entitled to an appropriate award on each cause of action as long as this did not result in a double recovery for the same items of damage.*" (Gypsum Carrier, Inc. v. Handelsman, supra, 307 F.2d at pages 532, 533. Emphasis supplied.)

Muise v. Abbott, supra, is directly in point, except that here there is an attempted contractual subrogation. In that case complainant was injured when he fell through an open hole on a wharf owned by the Gorton Company. He was a seaman and, at the time of the accident was returning to his ship after an authorized evening ashore. Suit was filed against the owner of the wharf for negligence and prior to trial the case was settled by payment of $5500.00 to complainant with judgment to that effect being entered by the Court. Thereafter, suit was filed against the employer for

maintenance and cure as a result of these same injuries. On appeal, the Court said:

> "Thus it is true that the appellant's injury endowed him with two separate causes of action: * * *. But it does not follow from this, as the appellant contends, that he can recover full damages in both of the actions available to him. The reason for this is that the damages recoverable in each action to some extent overlap, *and the rule prevails in admiralty as elsewhere in the law that no one may recover compensatory damages more than once.*" (Emphasis supplied. 160 F.2d 590 at p. 592.)

We take judicial cognizance of the claims advanced by the pleadings in the original suit filed in this court and of the answer of the defendant wherein the damages set forth above under our paragraph 4, were put at issue by the defendants. Norris v. United States, 86 F.2d 379 (8 Cir. 1937) rev. on other grounds 300 U.S. 564, 57 S.Ct. 535, 81 L.Ed. 808 (1937); Bowe-Burke Mining Co. v. Willcuts, 45 F.2d 394, (W.D.Minn. 1930); Cordle v. Kelly, 117 F.Supp. 662 (D.C. Minn. 1953) affirmed 217 F.2d 757 (8 Cir. 1954).

That suit has been released and settled in full, consequently all of the claims put forward by the plaintiff have been satisfied.

[5] We further conclude that allowance of such a subrogation as we find in the instant case would contravene public policy. The Federal Employers' Liabil-

ity Act is an outgrowth of economic and social considerations which prompted the enactment of many workmen's compensation laws in the several states, and of the Longshoremen's and Harbor Workers' Act by the Congress. Tiller v. Atlantic Coastline R. R. Co., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L. Ed.2d 382 (1958). In Kernan, the history of the two statutes in question was reviewed and in relation to the considerations prompting enactment of the Jones Act, the Court said:

> "* * * it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, *the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business.* For most industries this change has been embodied in Workmen's Compensation Acts. *In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents.* But instead of a detailed statute codifying common-law principles, Con-

> gress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But *it is clear that the general congressional intent was to provide liberal recovery for injured workers,* * * * it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." (Kernan v. American Dredging Co., supra, 78 S.Ct. at page 397-398. Emphasis supplied.)

[6] The remedy given to seamen by the Jones Act is exclusive against their employers for negligence. The benefits of these special statutes are limited to the named beneficiaries and their named survivors as set forth under their terms. The defenses of assumption of the risk, fellow-servant's doctrine and other defenses normally available to tort feasors are abrogated in favor of broader protection of employees and to permit the extension of this rule to the insurers of such tort feasors by assignment or subrogation is unacceptable.

Were we to recognize and give validity to such an agreement, the third-party tort feasor in such cases, by the simple expedient of entering into a settlement with the injured party and taking a subrogation to his rights against his employer, assuming that

such rights exist, could avoid completely the effects of his own negligence and in so doing would have the advantage of the limited defenses available in these cases. This would subvert the purposes of the law and contravene the public policy which led to its enactment.

In our opinion, the third-party tortfeasors and their insurer in this case are limited to their claims against Romero's employer to whatever action in indemnity they may have under their contracts. These claims, although advanced in suit No. 8949, have been dismissed.

For the foregoing reasons, we sustain the motions to dismiss and for judgment on the pleadings. This conclusion makes it unnecessary to consider the motion for summary judgment on grounds that plaintiff was not a seaman.

The attorneys for defendant will present for signature formal judgment dismissing the complaint.

APPENDIX "D"

Linake J. ROMERO and Fidelity & Casualty Company of New York,
Appellants,

v.

FRANK'S CASING CREW AND RENTAL TOOLS, INC., et al., Appellees.
No. 21688.
United States Court of Appeals
Fifth Circuit.
April 5, 1965

Appeal from the United States District Court for the Western District of Louisiana; Richard J. Putnam, Judge.

Lawrence K. Burleigh and Levy & Burleigh, Lafayette, La., for Linake J. Romero.

Richard C. Meaux and Davidson, Meaux, Onebane & Donohoe, Lafayette, La., for appellant Fidelity & Casualty Co. of New York.

Francis Emmett, New Orleans, La., Nicholls Pugh, Jr., Lafayette, La., Terriberry, Rault, Carroll, Yancey and Farrell, New Orleans, La., and Pugh & Boudreaux, Lafayette, La., Nicholls Pugh, Jr., Lafayette, La., of counsel, for appellees.

Before WOODBURY,* JONES and GEWIN, Circuit Judges.

PER CURIAM:

The facts giving rise to this controversy and the law applicable to it are fully set forth in the opinion of the district court. Romero v. Frank's Casing Crew and Rental Tools, Inc., D.C., 229 F.Supp. 41. The judgment is

Affirmed.

*Senior Judge of the First Circuit, sitting by designation.

APPENDIX "E"

PERMANENT RECORDS
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 23,888

MRS. CHESTER BILLIOT, IND. ETC.
Appellant

versus

SEWART SEACRAFT, INC.
Appellee

Appeal from United States District Court for the Western District of Louisiana

---

Multilith Record

Filed: July 26, 1966

-1-

Chester Billiot met accidental death on June 7, 1964, while working in the Gulf of Mexico as captain of Crewboat SKIPJACK, which was serving the McDermott Lay Barge #21.

-2-

Petitioner, as administratrix of the Succession of Chester Billiot, has petitioned the Court in said succession for authority to *partially* settle a certain cause and right of action as administratrix of the succession and as the personal representative thereof, for the sum of Twenty-one Thousand Seventy-five ($21,075.00) Dollars, the said funds to be distributed as follows:

A. Dora Mitchell Billiot, widow of Chester Billiot	15,825
B. Dora Mitchell Billiot, individually, as natural tutrix and for the use and benefit of the minor, Kathy Ann Billiot	5,250.00

-3-

As shown in the above tableau of distribution, the minor, Kathy Ann Billiot, is to receive the sum of $5,250.00 in said settlement.

-4-

The cause and right of action as reflected in the inventory heretofore filed exists against the Tug DOC II.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO. 648

NEWELL H. SMITH, JR.,
Petitioner,

Versus

NOBLE DRILLING CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

May it please the Court:

Respondent's opposition to the application herein requires petitioner's brief reply in two respects:

1. Respondent (at p. 5 of its opposition) is patently in error when it implies and then asserts that petitioner has received "full satisfaction" for his injuries; and

2. Respondent (at p. 12 of its opposition) apparently admits that petitioner's application presents an important question of maritime law; it says:

> "Underlying the question the Supreme Court is here called upon to determine is the question what is the admiralty rule to be applied in [restricted release personal injury cases]."

FULL SATISFACTION

Respondent's assertion that petitioner has received "full satisfaction" for his injuries in the form of the settlement which he effected with his former employer and its insurer has no basis in the record of this case.

There has never been a trial of any aspect of quantum; the amount of damage which petitioner sustained as a result of his injuries has never been adjudicated by either Court or jury.

Indeed, Judge Cassibry's decision quite plainly did not purport to decide the amount of petitioner's damage. Solely upon the basis of the *Romero* case, Judge Cassibry held:

> ". . . that a monetary settlement coupled with a dismissal of claim against one alleged tortfeasor . . . will bar prosecution of all claims against any other alleged tortfeasor, *regardless of whether or not the amount received in said settlement actually constitutes full compensation for plaintiff's damage;* . . ." (Petitioner's Appendix "A", p. 10) (Emphasis added)

Petitioner has never represented, either in the instant application or in any of the Courts below, that he is entitled to a "double recovery" of damages for the injuries which he sustained on December 11, 1962. All that he has ever contended, and all that he now contends, is that he is entitled to "full recovery" for these injuries. His quarrel with the decisions of which review

is here sought is that they have, as a matter of law, denied him his day in Court and his opportunity, against the un-released parties allegedly liable to him, to prove the full amount of his damages. That opportunity is all that petitioner, by his application, seeks to acquire.

THE QUESTION PRESENTED

In his original application for certiorari (pp. 2 & 3) petitioner represented to this Honorable Court that his application presented only one question:

> "Under the General Maritime Law of the United States, if a seaman is injured by the alleged joint conduct of his employer and a third party, may he settle with his employer and effectively reserve and retain his rights against the third party?"

Respondent (at p. 12 of its opposition) apparently concedes that petitioner's application does present an important question of maritime law; it states:

> "The underlying question the Supreme Court is here called upon to determine is the question what is the admiralty rule to be applied in such a case."

Respondent (at pp. 12 & 13 of its opposition) apparently seeks to urge that this Honorable Court should adopt "the strict common law rule" in maritime personal injury cases and should hold that under no circumstances may an injured claimant settle with one

alleged joint tortfeasor and reserve his rights against another.

Aside from the fact that "strict common law rules" have curried little favor with this Honorable Court in matters maritime, a cursory review of current authorities leaves little doubt that the original common law rule of "automatic" release of all parties allegedly liable is almost *passé*.

Indeed, it has been held that the "federal rule" is contrary to the so-called "common law rule," apparently even in the absence of a specific reservation such as is present in the instant case. *United States v. Hess*, 154 F. 2d 291 (CCA 3, 1946). It has also been held, in a closely analagous factual situation, that the release by a claimant of his FELA (45 U.S.C.A. §51 et seq.) employer does not automatically operate as a release of an "independent tortfeasor." *Husky Refining Co. v. Barnes*, 119 F. 2d 715 (CCA 9, 1941). The same result was reached by the same Court where the release of an employee specifically reserved the claimant's rights against his employer, the United States. *Friday v. United States*, 239 F. 2d 701 (CCA 9, 1957).

The respondent (at p. 13 of its opposition) has referred this Honorable Court to the annotation contained in 73 ALR 2d 403, et seq.

The second section of the annotation reads as follows:

"The original common-law rule is to the effect

> that the release of one joint tortfeasor releases all, even if there is an express reservation of the releasor's rights against the tortfeasors who are not parties to the release. This rule has often been based on the view that there can be but one compensation for a joint wrong and that the cause of action is satisfied once the injured party is paid for his injury by one of the joint tortfeasors. The rule has been vigorously attacked by lawwriters. It has been described as merely a 'surviving relic of the Cokian period of metaphysics.' It tends to defeat the fair expectations and intentions of the parties to the release. It may be noted that all but one of the Continental Legal Systems have flatly rejected the rule." 73 ALR 2d 407-408.

In view of the foregoing, if for no other reason, petitioner submits that this legal "relic" should not become a part of the General Maritime Law of the United States.

CONCLUSION

For the foregoing reasons, as well as those previously set forth, this application for certiorari should be granted; the decisions below should be reviewed; this Honorable Court should hold that the restricted release given by petitioner to his former employer preserves his rights against respondent; and this matter should be remanded to the Supreme Court of Louisiana with directions to accord petitioner his day in Court.

All of the foregoing is

Respectfully submitted,

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Certificate

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the attached Reply Brief on behalf of petitioner have been served upon the respondent, Noble Drilling Corporation, by delivering the same to its attorney, George V. Baus, Esq., in the offices of Adams & Reese, Attorneys at Law, 847 National Bank of Commerce Building, New Orleans, Louisiana, this day of January, 1968.

Samuel C. Gainsburgh
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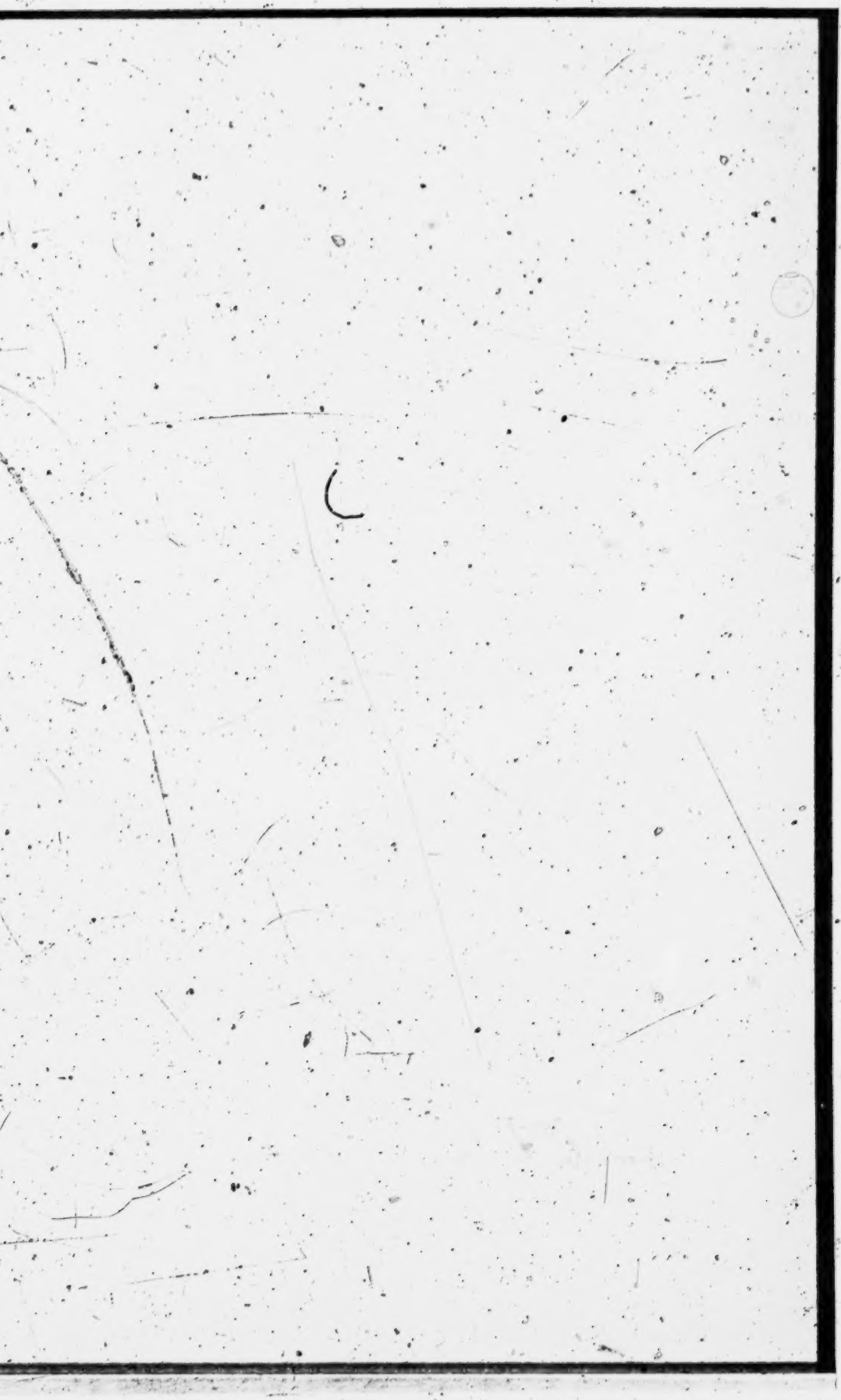

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SMITH *v.* NOBLE DRILLING CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 648. Decided January 29, 1968.

PER CURIAM.

The petition for a writ of certiorari to the Supreme Court of Louisiana is granted. The judgment below is vacated and the case is remanded to the Supreme Court of Louisiana for further consideration in light of *Billiot* v. *Sewart Seacraft, Inc.*, 382 F. 2d 662 (C. A. 5th Cir. 1967), and *Loffland Brothers Co. v. Huckabee*, 373 F. 2d 528 (C. A. 5th Cir. 1967).